IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5317 of 2002

with

CRIMINAL MISC.APPLICATION No 3566 of 2002

and

CRIMINAL MISC.APPLICATION No 4646 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ROSHAN SHARMA MANAGER

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Misc.Application No. 5317 of 2002

MR MITUL K SHELAT for Petitioner No. 1-8
MR SJ DAVE, APP for Respondent No. 1

2. Criminal Misc.Application No. 3566 of 2002
MR MITUL K SHELAT for Petitioner No. 1
MR SJ DAVE, APP for Respondent No. 1

3. Criminal Misc.Application No. 4646 of 2002
MR YATIN N OZA, SR. ADVOCATE WITH MITUL K SHELAT
for Petitioner No. 1-2
MR SJ DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 21/04/2003

ORAL JUDGEMENT

These three petitions have been filed by different sets of petitioners under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") for an appropriate order or direction, for quashing First Information Report annexed to the respective petitions and further investigation initiated in pursuant to the said FIR in Vapi GIDC Police Station, C.R. No. 87 of 2002, filed by the Police Inspector of the said Police Station, for offences punishable under Section 420 read with Section 120(B) and 34 of IPC, as well as for an offence punishable under Section 7 of the Essential Commodities Act, 1955.

2. The petitioners in the respective petitions have come out with a case that the petitioner of CR.M.A NO. 3566 OF 2002 is the Managing Director of Kalpita Tex Chem Industries Private Limited having its factory at Silvasa. That petitioner no. 1 in CR.MA NO. 4646 OF 2002 is the Executive Director and other petitioners in that petition are the Workmen working in the said Company. That the petitioners in CR.MA NO. 5317 OF 2002 are the employees of the said Company.

3. It is their common case that the said Company has been engaged in the business of manufacturing Kalsol-200 and Kaloil-900 at its factory premises at Silvasa. That, the said company had delivered 12000 liters of Kalsol-200 to Disha Chemicals, through its carriers and agent Jai Bhairavnath Bulk Carriers on Ex-Factory basis, after entering necessary entries in the relevant registers including the excises registers. That, the tanker containing the said Kalsol-200 was intercepted and thereafter, seized by the Police Inspector of Vapi GIDC Police Station, on an apprehension that the said tanker

contained Naptha and the same was to be used for the purpose of adulteration of petrol. Certain process was undertaken with which we are not concerned.

4. The petitioners in the respective petitions have come to this Court with these petitions, under Section 482 of the said Code, for appropriate order, for quashing the said FIR against the petitioners. The main grievance of the petitioners in each petition is that they were not involved in the commission of the offence and that no offence has been made out against them. It is also their case that the investigation has been undertaken by the Police Inspector of the aforesaid police station and that the Police Officer below the rank of Dy.S.P. has no power, function or jurisdiction to undertake any investigation in the said matter. That, therefore, the entire proceeding initiated on the material collected on search and arrest and seizure are illegal and without the sanction of law. That, the allegations made in the FIR do not make out a prima facie case of any offence against the petitioners. That, no offence has been disclosed against the petitioners. That, when the aforesaid Kalsol was sold by the company on 02/06/02, on an Ex-Factory Basis, the company had lost control over the said Kalsol-200 and as the carrier was the agent of the purchaser the company could not be said to have committed any offence. That, on the whole, the FIR filed against the petitioners is illegal and deserve to be quashed and set aside. The petitioners have, therefore, prayed that the present respective petitions be allowed, the aforesaid FIR be quashed and set aside qua the petitioners.

5. It seems that Notice was issued at the first instance and Rule was issued thereafter. Mr.S J Dave, learned APP appears on behalf of the State, in response to the service of Notice of Rule. I have heard Mr.Y N Oza, learend Senior Advocate appearing with Mr.Mitul Shelat for the petitioners and learned APP for the State. They have also taken me through the provisions of law and orders and through the FIR on record.

6. For the purpose of dealing with the issue in question, we may not dispute the fact that the petitioners are connected with the aforesaid company, in one way or the other.

7. So far, the FIR is concerned, the same has been placed at Page 18, in CR.M.A NO. 3566 of 2002. On going through the said FIR, it can be gathered that the offence was committed at 1.00PM, on 07/06/02 and the FIR was

registered at 2.15PM on 08/06/02. On going through the said FIR, it seems that the FIR was filed by Mr.M J Parmar, Police Inspector, Special Squad, Valsad on the basis of a secret information received by him that Tanker No. GQO 1430 contained some Chemical and that, the Tanker No. GJ 5U 3437 contained Kerosene. It was alleged in the FIR that the drivers of both the tankers were carrying Naptha and Kerosene, respectively. That, when bills, vouchers and pass/ permits were asked for, certain information was given by them, but no material was produced to show that the said Naptha and Kerosene were being carried lawfully. The said PI himself undertook the investigation and prima facie noticed that the Naptha and Kerosene were being carried, with a view to add the same in petrol and thereby, with an intention to cheat the public at large, committed criminal conspiracy under Section 420, 120(B) and 34 of IPC, as well as an offence punishable under Section 4 of the Essential Commodities Act, 1955.

8. Mr.Y N Oza learned Senior Advocate appearing with Mr.Mitul Shelat has mainly argued on the point that the investigation has been carried out by the Police Inspector, under previous information and that the Police Inspector had no authority or jurisdiction to investigate an offence relating to Naptha. In order to substantiate the said argument, Mr.Oza has relied upon the provisions made in The Solvent, Raffinate and Slop (Acquisition, Sale, Storage and Prevention of use in Automobiles) Order, 2000 as well as in The Naptha (Acquisition, Sale, Storage and Prevention of use in Automobiles) Order, 2000. Both the orders have been issued by the Union of India in exercise of the powers conferred on them by Section 3 of the Essential Commodities Act, 1955 (for short, "the Act"). There is no serious dispute about the same. Now, the important provisions can be gathered from Clause 4 of the said two orders which may be referred for ready reference as follows;

Clause 4 : Power of search and seizure.

Solvent, Raffinate and Slop (Acquisition, Sale, Storage and Prevention of use in Automobiles) Order, 2000.

(1) Any Gazetted Officer of the Central or the State Government or any police officer not below the rank of Dy. S. P. duly authorized, by general of special order by the Central or the State Government or any officer of a Government oil company or any oil company authorized by the

Central Government, not below the rank of Sales Officer may, with a view to securing compliance with the provisions of this Order, or for the purpose of satisfying himself that this Order or any order made thereunder has been complied with

(a) Enter and search any place or premises being used or suspected to be used in the business of the dealer, transporter, consumer or any other person who is an employee or agent of such dealer, transporter, consumer with respect to which there is reason to believe that the provisions of this Order have been or are being or are about to be contravened.

(b) Stop and search any person or vehicle or receptacle used or intended to be used for the movement of the product arousing or receiving the product in contravention of this Order,

(c) Inspect any book of accounts or other document or any stock of the product used or suspected to be used in the business of the dealer, transporter, consumer or any other person suspected to be an employee or agent of the dealer, transporter or consumer.

(d) Take samples of the product and seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of this Order and thereafter taken or authorize the taking of all measures necessary for securing the production of stocks or items so seized before the Collector having jurisdiction under the provisions of the Essential Commodities Act, 1955 and for their safe custody pending such production.

Clause 4 : Power of search and seizure.

Naptha (Acquisition, Sale, Storage and Prevention of use in Automobiles) Order, 2000.

(1) Any Gazetted Officer of the Central or the State Government or any Police Officer not below the rank of Deputy Superintendent of Police duly authorized, by general of special order by the Central or the State Government or any officers of a Government Oil Company or any other

Oil Company authorized by Central Government, not below the rank of Sales Officer may, with a view to securing compliance with the provisions of this Order, or for the purpose of satisfying himself that this Order or any order made thereunder has been complied with,-

(a) Enter and search any place or premises being made use or suspected to be made use in the business of the dealer, transporter, consumer or any other person who is an employee or agent of such dealer/ transporter/consumer with respect to which there is reason to believe that the provisions of this Order have been/are being or are about to be contravened.

(b) Stop and search any person or vehicle or receptacle used or intended to be used for the movement of the product arousing or receiving the product in contravention of this Order,

(c) Inspect any book of accounts or other document or any stock of the product used or suspected to be used in the business of the dealer, transporter, consumer or any other person suspected to be an employee or agent of the dealer, transporter or consumer.

(d) Take samples of the product and/or seize any of the stocks of the product which the officer has reason to believe has been or is being or is about to be used in contravention of this Order and hereafter take or authorize the taking of all measures necessary for securing the production of stocks/items so seized before the Collector having jurisdiction under the provisions of the Essential Commodities Act, 1955 (10 of 1955) and for their safe custody pending such production.

9. Clause 4 of both the orders clearly shows that so far police officers below the rank of Dy.S.P. are concerned, they are not invested with powers to enter, search any place or premises, to stop and search any person or vehicle, to inspect the books of accounts and to take samples of the products etc. This shows that all powers of search, seizures etc. have been conferred on a police officer of a rank of a Dy.S.P. or above duly authorized by a general or special order of the Government.

10. In the present case, we find that the investigation has been started, before the filing of FIR by a Police Inspector and even after the filing of FIR, the investigation has been continued in the hands of a Police Inspector. On the aforesaid basis, an argument has been advanced by My.Y N Oza, that the investigating officer was a police inspector and under Clause 4 of the aforesaid two orders, he was not empowered or authorized to carry out an investigation and to act in accordance with Clause 4 of the said orders. That, therefore, the entire process of stopping the vehicle, taking samples etc. have been undertaken by a police officer who was not authorized or empowered to do so, by virtue of Clause 4 of the said two orders. He has, therefore, argued that the entire process has been undertaken by an Officer not authorized or empowered to do a particular act and therefore, the entire process is contrary to the provisions made expressly in Clause 4 of the aforesaid two orders and therefore, the entire process of investigation, collection of samples etc. is illegal on the face of it and the result or the outcome of such an investigation, will also be illegal as a necessary consequence.

11. Now, it is clear that Clause 4 of the aforesaid two orders makes it clear that the entire process, as has been narrated in Clause 4 of the said two orders, has to be undertaken by a police officer, not below the rank of a Dy.S.P. duly authorized by general or special order by the Government.

12. It has to be accepted that the said process of stopping the vehicle, collection of samples, search and seizure and despatch of samples for analysis, has been undertaken by a police inspector who is admittedly, an officer below the rank of Dy.S.P. It would, therefore, be clear that the entire process of search, seizure and collection of samples has been undertaken by a police officer, who is not authorized or empowered by Clause 4 of the said two orders. This would mean that the entire process has been carried out illegally and has been done contrary to the provisions made in Clause 4 of the said two orders. This can be prima facie gathered from a bare reading of the said Clause and the FIR, which show that the said process was undertaken by a Police Inspector. Even during the course of the argument, the learned APP has not been able to dispute the said factual aspect.

13. So far, the legal aspect is concerned the learned Senior Advocate for the petitioner has relied upon an old decision of the Hon'ble the Apex Court rendered in

Ballabhdas Agarwal Vs. J.C. Chakravarty reported in AIR 1960 SC, 576, in which it has been observed that the provisions made under Section 537 and Section 12 of the Calcutta Municipal Act are not merely enabling but are obligatory and the initiation of a legal proceeding under the Act must be in accordance with the Act.

13.1 In Para 19 of the said judgment, it has been observed that the argument of the learned counsel for the appellant is that if a legal proceeding is to be instituted under the Municipal Act in question, it must be done in accordance with the provisions of the Act and not otherwise. On the other hand, on behalf of the respondent, it was canvassed that Section 537 is merely enabling in nature, as the use of the word "may" shows and the general principle embodied in the Code of Criminal Procedure of taking cognizance of an offence, is not in any way affected by Section 537.

13.2 In Para 23 of the said judgment, the Hon'ble the Supreme Court has observed that on examination of the provisions shows that the Calcutta Municipal Act, 1923 provides, inter alia, for a machinery for proceedings before Magistrates and other legal proceedings. That, all these provisions can have one meaning only, viz. that the machinery provided in the Act must be followed in enforcing these provisions. That, it would be against the scheme of the Municipal Act to hold that Section 537 is merely enabling in nature and that no private person may institute a legal proceeding under the Municipal Act, independent and irrespective of the provisions of the Act.

13.3 However, in Para 50 of the said decision it has been observed that it is unnecessary to decide whether Section 537 of the Calcutta Municipal Act, is merely enabling or mandatory and whether in the absence of a proper delegation, the health officer or other officers of the municipality or any private person could have initiated the prosecution in such a case.

14. In Malkiat Singh and Anr. Vs. State of Punjab reported in AIR 1970 SC, 713, distinction has been made between an act of preparation to commit the offence and an attempt to commit an offence.

15. In Roy V. D. Vs. State of Kerala, reported in AIR 2001 SC 137 it has been observed that;

"No officer other than an empowered officer can resort to S.41(2) or make a complaint under s.36(A) of

NDPS Act. Any collection of material, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorized officer under S.41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV of the NDPS Act and use of such a material by the prosecution vitiates the trial. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the Court; in such a case not quashing the proceedings would perpetuate abuse of the process of the Court resulting in great hardship and injustice to the accused. Exercise of power under S.482 of the Cr.P.C. to quash proceedings in a case like this would indeed secure the ends of justice."

16. In Babu Verghese and Ors. Vs. State of Kerala, reported in 1999 (3) SCC, 422, it has been observed that an Act cannot be considered to have been done, unless it was done in the prescribed manner. In Para 31 and 32 of the said judgment it has been observed as follows;

Para 31 : It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor which was followed by Lord Roche in Nazir Ahmad v. King Emperor who states as under:

["Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."]

Para 32 : This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P. and again in Deep Chand v. State of Rajasthan. These cases were considered by a three-Judge Bench of this Court in State of U.P. v. Singhara Singh and the rule laid down in Nazir Ahmad case was again upheld. this rule has since been applied to the exercise of jurisdiction by courts an has also been recognized as a salutary principle of administrative law.

17. In T T Anthony Vs. State of Kerala reported in AIR 2001 SC, 2637, it has been observed that there cannot be a second FIR in support of the same congnizable offence. It has also been observed that when essence of both the FIRs is same, then subsequent FIR is in the nature of a second FIR. That, its recording was irregular and a fresh investigation by the investigation agency was unwarranted and illegal.

18. In a case of Union of India Vs. L.D.Balam Singh reported in 2002 (9) SCC, 73, it has been laid down that noncompliance with the provisions contained in Section 41 and 42 of the NDPS Act, 1985 would vitiate the entire trial.

19. Similar view was adopted in a subsequent decision of Chunna Vs. State of Madhya Pradesh reported in 2002 (9) SCC, 363.

20. A decision of the High Court was set aside in State of Karnataka Vs. Arun Kumar Agarwal reported in AIR 2000 SC 411, on the ground that clear finding was not given by the High Court.

21. In Escorts JCB Limited Vs. Commissioner of Central Excise, Delhi II reported in 2003 (1) SCC, 281, it has been laid down that there was a contract to effect delivery of goods ex-works, but the department had taken a view that the ownership continued with the manufacturer. In the present case, it has to be considered that this would again be a matter of fact. It would be open to the petitioners to produce appropriate material before the investigation officer in order to enable him to appreciate the factual and contractual aspects of the case. This is not a pure question of law which can be entertained at a pre evidence and pre investigation stage.

22. At the same time, it has been consistently laid down that when some ingredients of some offence are present and when no malafide has been alleged, then in that event, it would not be open to this Court, to quash and set aside a first information report or a complaint or an investigation or inquiry pursuant thereto. Such a principle can be gathered from the State of Karnataka Vs. M.Devendrappa & Anr. reported in JT 2002 (1) SC, 213.

23. Almost similar view was adopted by the Hon'ble the Supreme Court in M/s. M.M.T.C Limited & Anr. Vs. M/s. Medchl Chemicals & Pharma (P) Ltd. & Anr.

reported in JT 2001 (9) SC, 563 and in the State of Bihar Vs. MD. Khalique and Another reported in 2002 (1) SCC, 652.

25. In Rishi Anand & Anr. Vs. Government of N.C.T. of Delhi reported in JT 2002 (3) SC, 384 the matter related to an offence punishable under Section 406 of IPC and under the provisions of the Dowry Prohibitions Act. The first applicant, therein, was a resident of USA and the FIR was not quashed against the said accused. The Hon'ble the Supreme Court observed that applicant no. 1 was not at all connected with the said offence. Therefore, the FIR against him was quashed, retaining the same, qua the other accused persons.

26. Ultimately, the fact remains that under Clause 4 of the aforesaid two orders issued by the Union of India in exercise of powers under Section 3 of the said Act, the powers vest in an officer not below the rank of a Dy.S.P.. In the present case, we find that the investigation has not been carried out and the process has not been undertaken by an officer not below the rank of Dy.S.P.. It is also required to be considered here that when the Police Inspector, even after filing the FIR and undertaking investigation came to know that the matter related to Naptha and yet he continued the ivestigation and did not entrust the same to an officer not below the rank of Dy.S.P.. In above view of the matter, I am of the view that the petitioners are right in saying that the FIR and the investigation qua the petitioners may be quashed, as it has not been an outcome of an investigation, by an empowered officer.

27. The argument of the learned Senior Advocate for the petitioner is that the entire proceeding may be quashed and set aside. At the same time, it is also required to be considered that apart from Naptha, Kerosene Tanker was also seized and the allegation is that this was also for the purpose of its use, to be added in petrol. So far Kerosene Control Order is concerned, no provision has been made that the investigation relating to any offence under Kerosene Control Order can be entrusted only to an officer not below the rank of a Dy.S.P. The learned Senior Advocate for the petitioners has not been able to show that Kerosene Control Order provides for an investigation into an offence under that Order by an officer not below the rank of a Dy.S.P.. Therefore, it prima facie appears that an officer not below the rank of a Dy.S.P. is not debarred from undertaking investigation arising out of a violation of the Kerosene Control Order which has been

brought into force in exercise of the powers conferred by Section 3 of the said Act of 1955.

28. So, as regards Naptha and Solvent Orders, the investigation can be undertaken only by an officer, not below the rank of a Dy.S.P.. In the present case, the action has not proceeded in accordance with law as regards Naptha and hence the said proceeding is required to be quashed and set aside. It is also required to be considered that when the Police Inspector had no power to undertake any seizure with respect to Naptha and Solvent, the entire proceedings, including the FIR and investigation into the matter pursuant to the seizure and FIR, will be required to be quashed and set aside. This would mean that even the offence under IPC or any other enactment, arising out from the seizure of Naptha, its chemical analysis and outcome thereof, will also be required to be quashed and set aside, meaning thereby, that the investigation cannot proceed further, even with respect to IPC offence or other related offences arising from the seizure of Naptha, its analysis and the outcome of the analysis.

29. At the same time, as regards the offence arising from Kerosene Control Order and other related offences, including IPC offences, it would not be required to be quashed and set aside and it would be open to the investigating agency to proceed ahead with respect to the said offences. It would, therefore, be open to the said agency to complete the investigation and submit a final report to the concerned Court in accordance with law.

30. At the same time, it is also required to be considered that sometimes there is a thin demarcating line between a preparation for the commission of an offence and an attempt to commit the same. Therefore, I am of the view that this is not a stage at which this Court should deal with the said subject. I am also of the view that this would be a premature stage, to decide as to whether the matter had reached the stage of an attempt to commit an offence or whether it was still at the stage of preparation for the commission of an offence.

31. Anyway, for the foregoing reasons, these applications are partly allowed and the FIR being Crime Register NO. 87 of 2002 registered before Vapi GIDC Police Station involving the present petitioners in all the three petitions relating to offence punishable under The Naptha (Acquisition, Sale, Storage and Prevention of use in Automobiles) Order, 2000 and related IPC offences

and the investigation pursuant thereto are ordered to be quashed and set aside and the investigating agency is prohibited from further investigating into the matter with respect to the offence pertaining to Naptha, its chemical analysis and the outcome thereto.

31.2 It is, however, made clear that the FIR and further investigation with respect to the offence, if any, arising from the Kerosene Control Order and related IPC offence is not being quashed and set aside and therefore, the investigation with respect to the offence under the Kerosene Control Oder and the related IPC and other offences, if any, is not prohibited.

31.3 Rule is made absolute partly to the above extent, in all the three matter. Direct Service permitted.

21/04/03 (D. P. Buch, J.)

FURTHER ORDER

1. At this stage, Mr.Mitul Shelat, learned advocate apppearing for the peetitioners in all the three matters states that the petitioners in each matter desire to file appropriate proceedings before appropriate Court and therefore, a request has been made that the interim stay granted by this Court may be continued for a further period of eight weeks. Mr.S J Dave, learned APP appearing for the State strongly objects to this, stating that the matters are not being investigated since long and no further time may be granted. He has also argued that the matters have been partly allowed and the investigation may be required to be undertaken with respect to the portion for which the petitions have been dismissed.

1.1 Having regard to the facts and circumstances of the case and after hearing the learned advocate for the parties, the interim relief granted earlier, staying further investigation in respect of the offence in question, is extended for a further period of FOUR WEEKS from today.

21/04/03 (D. P. Buch, J.)

pravin/